CHOICE OF LAW IN TORT — THE SONG THAT NEVER ENDS

*Janey Greene**

This is the song that never ends
It goes on and on my friend
Someone started singing it not knowing what it was
And they'll go on forever now because
It is the song that never ends ...[1]

INTRODUCTION

Choice of law in tort may seem to be a tune we cannot get out of our heads at the moment, but it must be remembered that it presents a set of problems which have vexed legal minds — practical, academic and judicial — for centuries. Recent years have seen the issue of conflicts between the tort regimes of the Australian states and territories prove particularly difficult to address. This article will first canvas some of the reasons for the difficulty in formulating a rule in this area. These reasons are many and varied. First, the proper or central function of the law of tort itself has long been the subject of dispute. Then, the very nature of a right in tort has not lent itself to any obvious choice of law approach. The rapid evolution in this century of new kinds of torts has exacerbated the matter. In addition to these problems inherent in the substantive law of torts, we in Australia, Canada and the United States must, whenever considering any choice of law issue, take account of our federal structures which add further complications. Given that political and judicial interpretations of these structures are also constantly evolving, it is not surprising that choice of law in tort is receiving a good deal of attention from academics, judges and law reform bodies, including the Australian Law Reform Commission.[2]

Having looked at factors which make the issue a hard one, this article will offer some comments on current thinking in the area. In particular, the strong trend at the moment to address the issue by opting for a *lex loci delicti* rule and the relatively novel argument that this (and any other) choice of law rule should do justice between the

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1 Theme song to children's television show: *Lambchop's Playalong*.

2 Australian Law Reform Commission, *Choice of law rules* (Report No 58, 1992).

parties by giving effect to their expectations, will be examined.[3] Ultimately, I will argue that choice of law in tort can only work properly if priority is given to choice of law concerns rather than tort concerns and that this must be done against a backdrop of constant evolution in the relevant concerns of both choice of law and of tort.

WHY IS IT SO HARD?

Our Anglo-Australian choice of law rules are "jurisdiction-selecting".[4] They depend upon a characterisation process to invoke the appropriate choice of law rule which, in turn, points to the appropriate jurisdiction's substantive law. Thus we have choice of law rules for tort, others for contract and others for property and so on. The strength of (and only logical justification for) such an approach to choice of law is that it allows for a choice of law rule which can at least accommodate, and perhaps further, the policies of the underlying substantive law. We find ourselves striving then to fashion choice of law rules which meet the concerns of choice of law, such as certainty and predictability of the law, the deterrence of forum-shopping, and justice to the individual parties, *as well as* meeting the concerns of the substantive law which underlie the dispute.

This linking of choice of law to a given substantive law seems more workable in some substantive areas than in others. The first three points raised in this part of the paper suggest that perhaps the concerns of the substantive tort law ought not to predominate as they make the choice of law exercise unduly difficult. The final point, regarding the relevance of federalism, highlights the attention which will inevitably be given to special choice of law concerns in a federal system.[5]

All this could ground an argument in favour of scrapping jurisdiction-selecting rules in Australian choice of law; however, that windmill will not be engaged here but only feebly tilted at in passing. This article will conclude with a more modest proposal — one which would see choice of law in tort give itself over to choice of law concerns and behave as any good set of adjectival laws should by promoting a system of efficient and fair adjudication.

The proper role of tort law

A threshold reason for the difficulty inherent in formulating a choice of law rule specifically for tort is the lack of consensus as to the proper function of the substantive

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3 The argument that choice of law rules should do justice to the parties is certainly not new, nor is the more specific argument that equates doing justice with giving effect to the parties' expectations, but these are both enjoying a relatively modern and overt popularity. See, for example, A J E Jaffey on choice of law generally in "The Foundations of Rules for the Choice of Law" (1982) 2 *Oxford J of Leg Studies* 368, and on tort specifically in "Choice of Law in Tort: A Justice-Based Approach" (1982) 2 *Legal Studies* 98.

4 "Jurisdiction-selecting rules" are, in the words of Cavers who coined the phrase, rules "indicating the source of the law to be applied without regard to the law's content". See D Cavers, *The Choice of Law Process* (1965) at 9. Jurisdiction-selecting rules thus interpose a selective rule between the dispute and the applicable law. They differ in character from choice of law rules which provide a direct response to a dispute as to applicable law. Examples of these include "apply the better law" and "apply the law of the forum".

5 Such concerns have been given more attention in the United States where they are often referred to as "the needs of the multistate system". See *The Restatement of the Conflict of Laws* 2d (1971).

law of tort itself. Few areas of our substantive law can claim to suffer from an identity crisis of the magnitude of that which afflicts tort law. Does tort law exist to deter wrongdoing, to compensate loss, to allocate transaction costs or to reallocate wealth? Does it do what it does primarily for the good of the community at large or for the individual litigants? Is it a creature of natural or of positive law?

The fact that the tort lawyers and the judges cannot agree to answers to any of these questions is a fundamental problem for those same lawyers and judges when they must attempt to formulate a choice of law rule for tort. The choice of governing law will, of course, affect the outcome of a case by either facilitating, limiting or blocking recovery.[6] Some choice of law theories would lead to more recovery for more plaintiffs more of the time, influenced presumably by a philosophical view of tort law as a social adjustment tool. Such theories favour one of the forum-biased rules which encourage plaintiffs to choose the most recovery-friendly court.

Other tort philosophies are brought to bear on the choice of law process more subtly. A *lex loci delicti* rule, for example, is seen to give fullest effect to the deterrence value of tort law, but of course this begs the choice of law question of just which set of deterrent principles *ought* to apply — those of jurisdiction A or those of jurisdiction B. One attractive answer is that the applicable substantive law (be it deterrent, compensatory or whatever at heart) should be the law which the parties would have expected to apply. This view attempts a full answer to the choice of law question but displays a view of tort law as being legitimated by its congruity with people's expectations and resulting practices — a view which, as will be argued later, will surely strike many as unrealistic.

The nature of tort

Another stumbling block for choice of law in tort has been the lack of a quality inherent in the nature of tort which provides a clear starting point for choice of law analysis. The substantive areas of law which underlie choice of law problems can be grouped, somewhat simplistically, into those which concern issues of status, those which govern ownership of property and those which concern obligations. Most of these areas of law have something in their very natures which provide a starting point for choosing applicable law when a conflict of laws arises. Whether or not these starting points are viewed as being grounded in the parties' expectations as to governing law is not usually very important. Whatever the first principles at work, the starting points are seen as natural and thus parties expect them.

Thus, choice of law questions which depend on personal status have a basic internal logic. Party expectations either underlie or reflect the choice of law rules in these areas. These rules have long (and relatively uncontroversially) made personal connecting factors such as domicile, nationality or residence most relevant in pointing to the applicable law. Of course, a good deal of refinement goes on at the fringes, but there appears to be a natural starting point. Similarly, there is an internal logic to choice of

6 The truth of this is so evident as to render almost any choice of law decision vulnerable to the epithet "result-driven". It is submitted that those tort choice of law decisions which do not appear to be result-driven are often those in which the choice of law analysis has been abstracted and refined to a point which, in turn, strikes many as unacceptable. Thus the court is presented with a true dilemma, at least in so far as it is concerned with producing a decision which "looks" defensible.

law in property. The law of the location of the property should control unless there is a stronger connection between the litigation and the personal status of the property owner, such as may exist in succession cases or in cases of movable property. This may be because a person, in dealing with property, legitimately expects that property within a given jurisdiction is subject to the sovereign control of that political entity, or it may be that people hold this expectation because of the very nature of the concept of sovereignty. In other words, cause and effect are indistinguishable but this approach has taken on an air of naturalness.

Under the heading of obligations, however, the internal logic is evident only in those obligations which are creatures of intention. In contract, party autonomy to select a governing law of the contract is merely a corollary of freedom of contract, and the proper law of the contract concept involves an indirect search, through scrutinising objectively relevant factors, for the law which should coincide (again, cause and effect are open to debate) with the law the parties presumably would have expected to apply to their contract. With torts the logic begins to break down in various ways. For example, while Lord Diplock said that parties to a contract necessarily have at least inchoate expectations as to applicable law because contracts are creatures of the positive law and are not naturally occurring phenomena,[7] can the same be said (with the same confidence) of torts? The role of intention in tort is as an element of fault, not as a protected interest. To the extent that parties to a tort claim may have expectations rather than intentions, there is no fundamental principle that these should be effectuated. Rather it may be seen as desirable to fulfil such expectations as a device to give effect to some first principle of either tort (such as deterrence) or of choice of law (such as uniformity of results). These principles, however, can point in various directions to different applicable laws. Thus the substantive law of tort provides no obvious pointer to a governing law.[8]

This lack of some quality in the idea of tort itself, at least to point the way to an obvious starting point in choice of law disputes, has led to various attempts to impose an external logic on the matter. Notions of comity, which underlay all choice of law thinking for a time, were grounded in the logic of sovereignty tempered by concerns for convenient and orderly trade between, and movement of parties from, different states. While comity still has the power to persuade courts that there ought to *be* choice of law rules,[9] standing alone it offers very little assistance when courts must actually give content to these rules.

The vested rights theory, also grounded in ideas of sovereign territoriality, supplied this content essentially by treating rights which sounded in tort as being a form of property in the plaintiff. But, at the same time that the jurisprudential premises that

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7 *Amin Rashid Corp v Kuwait Insurance Co* [1984] AC 50 at 65.

8 The law of the place of the tort has perhaps the strongest intuitive appeal. Unfortunately, it has been advocated by theorists who defended it on less than credible grounds and attacked by others eager to discredit those grounds: see L Brilmayer, *Conflict of Laws: Foundations and Future Directions* (1991) ch 1. All this infighting amongst choice of law scholars has, it is submitted, left us with no feeling, intuitive or otherwise, that there is a natural solution to most tort conflict of laws questions.

9 See *Tolofson v Jensen* (1995) 120 DLR (4th) 289.

supported vested rights were being attacked,[10] the difference between choses in action (transferable and therefore property-like) and causes of action (not transferable and therefore not property-like) was being refined. Tort rights were eventually determined to fall into the latter category.[11] Once the policy decision[12] was made not to treat tort rights as transferable, the quasi-proprietorial vested right in tort was doomed. So the internal logic of property choice of law was no longer available to decide the tort choice of law dispute.

The local law theory of choice of law espoused by Walter Wheeler Cook[13] described what courts were doing (applying their own "local" law) when they decided whether to apply their own substantive law or that of some other jurisdiction, but it did not offer much guidance as to just which decision the court should make. Thus the historical accounts of choice of law theory in this century often point out that, once the vested rights theory was discredited, but before Currie offered his governmental interest theory, a theoretical vacuum existed.[14]

Brainerd Currie's writings did offer not only a description of choice of law process, but an argument as to what the ultimate decisions should be and why.[15] But his governmental interest analysis method[16] imposed an overtly external logic on all choice of law issues. It is the logic of parliamentary sovereignty and of *stare decisis* moderated by the recognition that these domestic concerns sometimes are not "interested" in the outcome of a particular dispute while parallel concerns of another jurisdiction may be "interested". What is not invoked in interest analysis is the internal logic of the underlying substantive laws in conflict. It does not matter whether the dispute is one arising out of tort, contract or family law. While this may be perceived as a strength — opting out of both the difficulties characterisation presents and the smokescreens it provides — it is submitted that one main appeal of a unilateral,[17] as opposed to jurisdiction-selecting approach, is that it allows for opting out of the difficulties which tort law presents for choice of law. It allows the theorist and the court to side-step the hard internal questions for choice of law which tort law raises. However, it is submitted that, whatever its attraction, the forum bias which Currie defends, on grounds that a court presumably has no business applying the law of some

10 See L Brilmayer, above n 8 on the link between vested rights and the declaratory view of the common law and the successful attack made on both by the American Realists.

11 At least those tort rights arising from personal injury claims. See W S Holdsworth, "The History of Choses in Action" (1919-20) 33 *Harvard L Rev* 997 at 1029 and O R Marshall, *The Assignment of Choses in Action* (1950) at 24.

12 The relevant policy concern appears to have been the avoidance of maintenance according to Holdsworth, ibid. And perhaps the demand for tort rights in the market place was insignificant.

13 W W Cook, *The Logical and Legal Bases of the Conflict of Laws* (1942).

14 L Brilmayer, above n 8 at 43.

15 B Currie, *Selected Essays on the Conflict of Laws* (1963) particularly ch 4 "Notes on Methods and Objectives in the Conflict of Laws".

16 This method examines the interests the relevant legal systems have in seeing their laws applied to the case at hand and emphasises the court's obligation to apply the legislation and precedents of its own jurisdiction.

17 By which is meant a focus on the legitimacy of applying a given law to the dispute. Such legitimacy may derive from, among other things, the territorial power of a sovereign to "reach" the dispute or from the valid interests of a sovereign in seeing its law applied to the dispute.

other sovereign, is untenable with regard to conflicts within a federation such as Australia. In Australia, the final appeal body is the High Court which (unlike the United States Supreme Court) declares the common law for all Australia, not for the particular State or Territory in which the case was first heard.[18] And the High Court cannot owe any greater allegiance to the statutes or common law rules of one Australian jurisdiction than another. It has no choice but to invoke a choice of law rule which exists independently of state legislative or judicial power.[19]

Next, the search for the proper law of the tort, as carried out in many United States jurisdictions and advocated in the *Restatement of Conflicts of Laws, Second*, makes a range of substantive tort concerns as well as many choice of law concerns potentially relevant.[20] In so doing it recognises that the concerns of the substantive tort law, while relevant, may not always point to an obvious choice of law. It is submitted that this is a great strength of the proper law concept which is not given adequate recognition when branded with the label of "flexibility" While most would admit that some flexibility is a good thing, if taken too far it becomes uncertainty. The proper law approach has been dismissed by many as providing too much flexibility to judges and yet it represents a valuable *conceptual* flexibility in an area which cannot make sense without it.

Enter the Rule in *Phillips v Eyre*.[21] The line of English and other Commonwealth cases following *Phillips v Eyre* seems to represent a throwing up of the courts' hands in terms of fashioning a sensible choice of law rule for torts. That case decided that if a tort would have been actionable in England had it happened there, and if it was actionable where it did occur, then the English courts had jurisdiction and would presumably apply English law. The case has been interpreted as affording a choice of law rule independently of issues of jurisdiction.[22] If the two threshold requirements are met, the court simply applies forum law. No choice of law principle or logic specific to tort is articulated, but this "double actionability" requirement results in a bizarre mix of tort and conflictual concerns. In Australia, the last bastion of the rule, any vestigial jurisdictional underpinnings of the rule in *Phillips v Eyre* have been removed by the Service and Execution of Process Act 1992 (Cth), s 15.[23] The rule is now a completely free-standing choice of law rule and makes less sense than ever in a context where personal jurisdiction over the defendant is not a barrier to a plaintiff's free choice of forum and, thus, of governing law.

As stated at the outset, a strong modern trend is to address all choice of law issues in terms of doing justice to the individual parties. This is less a logic of tort law principles than of choice of law principles. It perceives choice of law rules as a body of adjectival law the proper function of which is to facilitate, not determine, a proper

18 This important difference is observed by the High Court in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at footnote 51.

19 For many legal positivists such a superlaw concept is an uncomfortable one. Hence the readiness of some to infer a constitutional imperative perhaps. See below text at n 37.

20 *The Restatement of the Conflict of Laws* 2d (1971), s 145 coupled with the general concerns identified in s 6.

21 (1870) LR 6 QB 1.

22 See the judgment of Brennan J in *Breavington v Godleman* (1988) 169 CLR 41 at 110.

23 Also, s 20(4)(e) of the Act counts the appropriate law to be applied to a matter as a factor to be taken into account by a court considering whether to stay its proceedings in favour of the court of another state. This makes a nonsense of the first limb of *Phillips v Eyre* which requires the matter to be actionable according to the law of the forum.

substantive outcome. It is partly a reaction against the over-refinement and over-abstraction for which choice of law is notorious. The literature and judgments in this area are rife with anthropomorphic references to competing laws, competing sovereignties and competing policies. The newer focus on the reality that it is actual litigants who are competing is refreshing, but of course justice to the parties will mean different things to different judges and commentators. Some of the specific ways the general idea of justice to the parties has been translated into specific choice of law rules will be examined in the second part of this paper where it will be submitted that none of them is likely to meet all cases satisfactorily. Choice of law in tort is, therefore, still in search of a logic of its own which commands universal acceptance.

The rise and rise of tort law

The rapid development of tort law in this century highlights the amazing array of uses to which we put our tort law. With each new development comes the potential for new, or at least different, choice of law problems to be raised.

First, the mushrooming of negligence law saw the insurance industry go into battle mode. Two of its pre-emptive strikes were the reliance on contributory negligence as a complete bar to relief and, in the United States, the lobbying of legislatures to enact "guest statutes" limiting or barring recovery by non-paying passengers against negligent drivers. Statutory abrogation of the common law contributory negligence rule in the United States occurred at different times in the various states as did the enactments and later repeals of the guest statutes. Choice of law in tort became a growth industry with some very real society-wide implications to consider. Should choice of law become the handmaiden of the moves to reform (in favour of consumers) the oppressive tort law? "Better law" theory, which advocates applying the better of the conflicting laws, derived a boost from a common desire to answer a resounding yes to this question.[24]

Later, the product liability law revolution would again result in a patchwork of approaches to the substantive issues both internationally and within federal systems.[25] The choice of law concerns were not new but the tort concerns were shifting yet again.[26] Could and should choice of law rules be manipulated to achieve the changing goals of the substantive tort law? Certainly a need was perceived, perhaps as never before, to bypass choice of law problems through the use of uniform legislative schemes, either as to the substantive law of product liability or at least as to choice of law rules for product liability.[27] The social and economic implications of product

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24 See *Clark v Clark* 222 A2d 205 (1966) where the court openly considered the inherent superiority of its law to the proffered guest statute as a factor in choosing forum law, cited in R Leflar, *American Conflicts Law* (3d ed 1977) at 108-109.

25 In Australia the approaches taken to consumer protection in respect of defective products have been more uniform legislative ones and, of course, the common law is truly common, but the divergence of common law rules in the United States and of international rules elsewhere has driven a good deal of choice of law theorising.

26 Ehrenzweig argued that plaintiffs should have their choice of forum (within jurisdictional limits) and thus of applicable law (under his forum-biased theory) in product liability cases because only the defendants could determine which jurisdictions became available fora through their choices where to market their products. See A Ehrenzweig, *A Treatise on Conflict of Laws* (1962) at 591-593.

27 See The Hague Convention on the Law Applicable to Product Liability.

liability arguably provided clear evidence that tort law had reached the limits of its usefulness. Surely efforts to tailor choice of law rules to fit it were doomed.[28]

As "simple" product liability shaded into mass torts, toxic torts and environmental torts, the choice of law theorists, as well as their theories, were put to the test yet again. The sheer complexity, in choice of law terms,[29] of some of these cases made a mockery of any unqualified reliance on choice of law rules originally defended on the basis that they achieved defensible results in guest statute cases, or in cases deciding issues such as whether to let Mr Eyre sue Governor Phillips for wrongful imprisonment during an insurrection in Jamaica in the 1860's.

The uncertainty as to the relevance of federalism

If the concept of federalism is defined broadly so as to include not only modern formal federations like the United States, Canada and Australia but also trading blocks like the European Union, the older trading leagues of cities and the even older and looser trading patterns between city states, then it becomes clear that much of the theorising about choice of law has been done in federal contexts.[30] A key feature of these federations has always been some degree of homogeneity of culture, including legal culture. The degree of this homogeneity differed across the times and places providing the contexts for the various schools of choice of law thinking, but it was always quite high in comparison with a truly international choice of law context.[31]

In a modern formal federation such as the United States, which has been the source of a great deal of choice of law theory in the past two centuries, that homogeneity is even greater. Modern communication and transportation facilitate the homogenisation of even as large and legally fragmented an area as the United States. The relevance of commonalities of language, political ideology, legal philosophy and culture generally has only occasionally been recognised by choice of law theorists. Much more frequently it has been ignored and, from time to time, it is denied outright. Two quotations put the point very nicely. "Michigan's sovereignty is as foreign to Delaware as Russia's ... "[32]

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28 See D Berman, "To Brainerd Currie: A Fallen Giant" in Symposium on *Interest Analysis in Conflict of Laws: An Inquiry into Fundamentals with a Side Glance at Products Liability* (1985) 46 *Ohio State LJ* 457.

29 For example, in the agent orange cases, *In Re Agent Orange Product Liability Litigation* 580 F Supp 690 (1984), plaintiffs suffered injuries in all fifty of the United States as well as in various other countries, exposure to agent orange happened in Vietnam, Cambodia and Laos, agent orange was manufactured in five US states as well as in two other countries, the companies that manufactured agent orange were incorporated in, and/or had their principal places of business in, seven US states and the decisions to use the substance were made both in Washington, DC and in Vietnam. See R Weintraub, "A Defense of Interest Analysis in Conflict of Laws and the Use of that Analysis in Product Liability Cases" in ibid at 503-504.

30 See F Juenger, "A Page of History" (1984) 35 *Mercer L Rev* 419.

31 A Du Bois, "The Significance in Conflict of Laws of the Distinction Between Interstate and International Transactions" (1933) 17 *Minnesota L Rev* 361 as cited in the preface to E Sykes and M Pryles, *International and Interstate Conflict of Laws* (1975) at 14-16.

32 *City of Detroit v Proctor* 61 A2d 412 (1948) at 416.

and "For the purposes of private international law, South Australia is a foreign country in the courts of New South Wales ..."[33]

It is submitted that these statements would go against the intuitive grain of a great many Americans and Australians. These federations have matured, leaving behind their strong states and weak central government beginnings, which had their origins in jealous and competitive colonies which united strictly out of self-interest. The move toward strong identification with the nation relative to the state has had more time in the United States and the violent break with the external authority of England left a nationalistic void which the American nation, rather than the states, eventually filled. On the other hand, the general appellate jurisdictions of the Australian High Court and the Canadian Supreme Court (as opposed to the very limited common law appellate jurisdiction of the United States Supreme Court) has militated toward a truly national common law in Australia and Canada. The repatriation of the Canadian Constitution in 1982, the enactment of the Australia Acts in 1986 and the current republicanism debates in Australia are further evidence that the process is well advanced in these federations, as in the United States, and the treatment of sister states' and provinces' laws as "foreign" is artificial.

Limited judicial recognition of this fact can be seen in some recent cases. In *Breavington v Godleman*[34] a majority of the High Court agreed that interstate conflicts of law are different from international ones. Unfortunately, the majority could not agree on just what that difference was. Mason CJ found no constitutional imperative relevant to the choice of law problem, but held that, as Australia is one nation, it is inappropriate that different results might obtain if the same dispute were adjudicated in different parts of the nation. It is inappropriate that Australians should be able to forum-shop within Australia. This is an inference drawn more from the nature of nationhood than that of federalism. It is, however, obviously an inference that does not arise in a nation which is not a federation.

On the question of whether interstate conflicts are different from international ones, the judgment of Mason CJ relied rather heavily on the rhetoric of one-nationhood:

> ...on the international scene, there are situations in which the parties had no significant connexion with the law of a particular jurisdiction, especially the law of the place of the tort.
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> One cannot make the same comment with the same force about Australian residents with respect to the law of a State or Territory in which they happen to be at a particular time. Australia is one country and one nation. When an Australian resident travels from one State or Territory to another State or Territory he does not enter a foreign jurisdiction. He is conscious that he is moving from one legal regime to another in the same country and that there may be differences between the two which will impinge in some way on his rights, duties and liabilities ... It may come as no surprise to him to find that the local law governed his rights and liabilities ... He might be surprised if it were otherwise. In these circumstances there may be a stronger case for looking to the law of the place of the tort as the governing law ... [35]

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33 *Chaff and Hay Acquisition Committee v JA Hemphill and Sons Pty Ltd* (1947) 74 CLR 375 at 396 per Williams J.

34 (1988) 169 CLR 41.

35 Ibid at 78.

While there was no need in *Breavington* for Mason CJ to consider international conflicts, it is submitted that his attempt to differentiate the expectations of the international traveller from those of the interstate traveller is unpersuasive in that he seemed to prove the opposite of what he was trying to prove. Surely international travellers have a *higher* likelihood of expecting some law other than their own law to apply to them than do the interstate travellers in "one country". The sad thing is that this point (whether international differs from interstate) need not have been addressed at all in order to argue persuasively for the applicability of the *lex loci* to interstate torts in Australia. But, seen against the background that the rule in *Phillips v Eyre* was, and is, the Australian conflict rule for international torts, perhaps the attempt to break the interstate torts away, on some footing peculiar to them, was a tactical move. Subsequent decisions[36] have proven that several members of the Court were not ready to scrap *Phillips v Eyre* even for interstate torts, much less altogether.

The joint judgment of Wilson and Gaudron JJ in *Breavington* also called for the *lex loci delicti* rule for interstate conflicts, but argued that this rule is mandated by the Commonwealth Constitution, s 118, the full faith and credit provision. Their Honours found in s 118 an imperative that a matter should lead to the same legal consequence wherever sued on within Australia. They then said that, of all the available choice of law approaches, only a *lex loci* rule would achieve that uniformity of result and so it is, albeit indirectly, constitutionally mandated.[37] This reading of s 118 was a departure from existing interpretations both of s 118 and of its American prototype[38] and has failed to gather a following. The judgment may be criticised, not only on the grounds of its constitutional interpretation, but also for its perhaps naive failure to appreciate that a choice of law rule alone cannot guarantee uniformity of result. Too many other variables exist even if any given Australian court would apply the same substantive tort law. These include differing procedures, differing interpretations of the law in question and even as obvious a factor as the differing personalities and philosophies of judges and courts.

Deane J also cast his vote for a *lex loci* rule for interstate torts and based it on an inference as to what he perceived Australian federalism to be. In this sense his judgment is similar to that of Mason CJ but it went further down that track. The judgment is reminiscent of Detmold's argument[39] to the effect that a State law which has a direct impact on events occurring within the territory of that State essentially trumps the indirect applicability of the law of another State. Territoriality is the determining factor in characterising laws as directly, rather than indirectly, applicable, according to Detmold's reading of s 107 of the Constitution. The judgment of Deane J was, however, much more rhetorical in nature and perhaps less tightly reasoned as a result.

The first premise of Deane J's argument was that Australia is a unitary legal order or unit. This inference, he said, is supported by five aspects of the Constitution. (1) The original jurisdiction of the High Court and the provisions for vesting of federal

36 *McKain v Miller* (1991) 174 CLR 1 and *Stevens v Head* (1993) 176 CLR 433.
37 (1988) 169 CLR 41 at 98.
38 E Scoles and P Hay, *Conflict of Laws* (1982) at 89-95.
39 M J Detmold, *The Australian Commonwealth: a fundamental analysis of its constitution* (1985) ch 8.

jurisdiction in Federal and State courts "assume[s] the existence of a national law".[40] (2) The separation of legislative and judicial power means that the content of laws cannot depend upon which court is called upon to apply them. (3) Australia has a truly common law which applies in all its courts. (4) Individuals cannot constitutionally be subjected simultaneously to valid but inconsistent state laws.[41] (5) The general common law appellate jurisdiction of the High Court ensures that an Australian common law develops and remains common.[42]

Next, his Honour argued that application of private international law rules to interstate conflicts would "preclude the existence of a unitary national legal system", at least in so far as they lead to the application of forum law. Instead, the assumption of the founding fathers, that State legislative power had only a territorial reach, provided the constitutional backdrop to interstate conflicts.[43]

Therefore, a *lex loci delicti* rule was compelled by the spirit of the constitution at least. Section 118 was interpreted as compelling the application in any Australian forum of the law of the State with the closest territorial nexus to the matter in order to effectuate that spirit—the spirit of a unitary legal order.[44]

As suggested above, Deane J's judgment was perhaps more rhetorically than logically developed. Like most such attempts at persuasion, it requires a leap of faith here and there. The already converted probably find it a powerful argument. The sceptical may wonder whether those who drafted the Constitution (whose views seem to count on the issue of territorial limits on State legislative power but not on the gist of s 118) might be surprised to learn they had set up a unitary legal order which precludes the operation of the rules of private international law. It must be conceded that they had the good sense not to limit the High Court's appellate jurisdiction along the lines of the United States Supreme Court's, thus rendering the conflict of State common laws a marginal problem in Australia while it remains a booming legal industry in the United States. But that is about all that *must* be conceded to Deane J's reasoning.[45] The rest either works on the individual reader at an emotive or political level, or it does not.

Even more unfortunate than this fragmentation among the majority in *Breavington* is the fact that in the next case to raise an issue of tort choice of law within Australia,

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40 (1988) 169 CLR 41 at 122.

41 The source of this principle is not explained in Deane J's judgment but is fully explored by M J Detmold, above n 39. It seems to go to the very heart of many jurisprudential divides in both tort and choice of law by treating the conflict of laws as a conflict as to directives to the individual as to how to behave instead of conflicts as to what is to be done about the fact that the individual has behaved in a particular fashion. It is submitted that (particularly in a federation where standards of behaviour are fairly uniform) the conflicts will almost always be of the second type. In such a conflict, the citizen is subjected to only one standard — that which the forum court applies to him or her. Rules estopping the other party from relitigating the issue elsewhere prevent the application of inconsistent laws to the same set of facts.

42 (1988) 169 CLR 41 at 122-124.

43 Ibid at 128.

44 Ibid at 134-135.

45 B Opeskin, "Constitutional Dimensions of Choice of Law in Australia" (1992) 3 *Pub L Rev* 152.

McKain v Miller,[46] a majority of a newly constituted court[47] retreated to the rule in *Phillips v Eyre*. The proper approach to federal choice of law was held to be the application of the common law rules of private *international* law. Even here, though, the possibility of distinguishing the interstate from the international conflict was conceded. In considering whether to adopt a flexible exception along the lines of Lord Wilberforce's judgment in *Boys v Chaplin*,[48] the majority said that the circumstances in which the flexible exception might apply (where the *lex loci delicti* has no real connection to the proceedings) are unlikely to arise in the interstate context. Thus a flexible exception was inappropriate for interstate conflicts, and the question of its appropriateness in the international context was left open. It is clear there was some difference of views on this latter point among the majority, for the statements were limited to the interstate situation expressly in order to achieve consent among them.[49]

Still, the methodology is the same for interstate and international conflicts — full double actionability is required. And while lip-service is paid to the special relationship of sister states in a federation, the effect of the first limb of the *Phillips v Eyre* test, combined with the current High Court's views on the substance versus procedure dichotomy,[50] will always be to exclude the *lex loci* where it does not overlap the *lex fori*.

To summarise this point, in *Breavington* three divergent, yet similarly ineffectual, attempts were made to carve out a special approach to federal conflicts. The majority in *McKain v Miller* offered a largely illusory distinction between its treatment of the international and the interstate conflict. Currently, therefore, it makes little or no difference to our choice of law in tort rule that Australia is a federation. But the fact of federation, both here and elsewhere, and the current political and social debates as to the proper nature and status of our federation, have considerably muddied the waters for choice of law theory.

So choice of law in tort is a hard question for many reasons — some intractable, some transitory. Some sympathy for the court faced with addressing the issue is clearly

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46 (1991) 174 CLR 1.

47 Wilson J had left the Court and McHugh J had been appointed.

48 [1971] AC 356.

49 (1991) 174 CLR 1 at 39 per Brennan, Dawson, Toohey, McHugh JJ. In *Tolofson v Jensen* (1995) 120 DLR (4th) 289, five members of the Supreme Court of Canada took this inflexible view of inter-provincial conflicts, while allowing for the possibility of a flexible exception to the *lex loci* rule in international torts. Sopinka and Major JJ would have kept open the possibility of flexibility in the inter-provincial setting. Also note that Rich, Dixon and Evatt JJ in *Merwyn Pastoral Co v Moolpa Pastoral Co* (1933) 48 CLR 565 stated that, while it might be desirable to exclude the application of a foreign *lex loci* on grounds of forum policy, such an approach is inappropriate in the Australian federal context and not permitted by s 118. These views were adopted by Brennan and Dawson JJ in *Breavington*. See P Nygh, *Conflict of Laws in Australia* (6th ed 1995) at 18.

50 Continuing the common law tradition of giving "procedure" a wide scope so as to render some of the laws of the place of the tort inapplicable in the forum on the basis that they are procedural. In *McKain* the relevant provisions of the Limitation of Actions Act 1936 (SA) were classified as procedural, allowing the plaintiff to sue in New South Wales where he was not time barred. In *Stevens v Head* (1993) 176 CLR 433, provisions of the Motor Accidents Act 1988 (NSW), which limited the amount of damages available, were classified as procedural, enabling the plaintiff to have the benefit of forum (Queensland) damages.

due. And yet, equally clearly, the High Court can be said to have shown an inability or unwillingness to address the matter in a satisfactory way. In addition to its revival of the almost universally reviled rule in *Phillips v Eyre*, the Court appears to have considered the matter in total isolation from related issues. For example, rules as to choice of law, jurisdiction, *forum non conveniens* and the substance versus procedure question[51] should dove-tail nicely to effectuate the smooth management of interstate litigation.[52] Instead we have decisions which, taken together and against the background of relevant legislation, create a forum-shopper's utopia and all the associated evils that this implies: uncertainty as to liability for defendants as they wait to see which forum the plaintiff chooses; protracted litigation of the choice of law question and the attendant expense; and inequity based on unequal access to the benefits of forum choice even among plaintiffs. Legislative intervention may seem the only hope at the moment.[53] But while legislation is often the most appropriate mechanism for reforming the law, it is an unduly inflexible tool for this area of law for reasons which will be argued below.

CURRENT THINKING

The ascendancy of the *lex loci delicti*

The law of the place of the tort, the *lex loci delicti*, clearly dominates current choice of law thinking, both in terms of existing law in many jurisdictions and in terms of moves to reform the law in others. In Australia, the Australian Law Reform Commission, in its report on choice of law,[54] recommended federal legislation to the effect that the law of the place of the tort should usually govern both interstate and international conflicts.[55]

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51 All Australian states and territories have now legislated (as part of a uniform reciprocal legislative scheme within Australia at least) to reverse the effect of *McKain v Miller* on the characterisation of statutes of limitations. See Limitations Act 1985 (ACT), ss 56-57; Choice of Law (Limitations Periods) Act 1993 (NSW), s 6; Choice of Law (Limitation Periods) Act 1994 (NT), ss 5-6; Choice of Law (Limitation Periods) Act 1996 (Qld), ss 5-6; Limitations of Actions Act 1936 (SA), s 38A; Limitations Act 1974 (Tas), ss 32C-32D; Choice of Law (Limitation Periods) Act 1993 (Vic), ss 5-6; Choice of Law (Limitation Periods) Act 1994 (WA), ss 5-6. See also ALRC 58, above n 2, Draft Bill cl 42 which treats statutes of limitation and rules limiting damages or heads of damage as substantive.

52 To be fair, the Service and Execution of Process Act 1992 (Cth) which renders *Phillips v Eyre* a nonsensical choice of law rule within Australia (see above text at n 23) was only enacted following *McKain v Miller*. The legislation was, however, in the pipeline and could have been taken into account. (The Australian Law Reform Commission had reported on *Service and execution of process* in 1987 in ALRC 40.) See also the comment by H Johnson, "Historical and Constitutional Perspectives on Cross-Vesting of Court Jurisdiction" (1993) 19 *MULR* 45 at 78: "To leave the cross-vesting scheme afloat in the currently turbulent choice of law seas [following *McKain*] is to invite serious inefficiency and possible miscarriages of justice."

53 The recommendations in ALRC 58, above n 2, have languished since 1992. The Standing Committee of Solicitors-General are working toward agreement on uniform state legislation on interstate choice of law in tort.

54 ALRC 58, above n 2.

55 Ibid para [6.78]. It was recommended that the law of the place of the tort may be displaced but "should be displaced only where there is a 'substantially greater connection' with a

In the United Kingdom the House of Lords held that the *lex loci delicti* could apply to the exclusion of the *lex fori* in an appropriate case.[56] This was shortly before the introduction of what would become The Choice of Law (Miscellaneous Provisions) Act 1995 (UK) which provides in s 11 that, as a general rule, the law of the place of the tort is the applicable law. Section 12 then allows for displacement of that law if it appears that the law of some other place is "substantially more appropriate" given the significance of the factors which connect the tort to the law of the place of the tort and the significance of those which connect it to another country. The Supreme Court of Canada has unanimously rejected the rule in *Phillips v Eyre* and replaced it with a *lex loci delicti* rule in the cases (which were heard together) of *Tolofson v Jensen* and *Luca v Gagnon*.[57] And in Europe the *lex loci delicti* has long been the favoured rule in many countries[58] and so naturally it forms the basis of some moves there to unify choice of law approaches.[59]

Meanwhile in the United States, the multiplicity of jurisdictions, both state and federal, combined with the hands-off approach of the Supreme Court, makes it difficult for any choice of law approach to be declared the winner at any given point in time. In 1987 de Boer was lamenting the retreat to the *lex loci delicti* in some important United States jurisdictions.[60] What seems clear from the academic literature is that, following the "revolution" in favour of Currie's interest analysis which heavily favoured the law of the forum, there has been a counter-revolution which has restored the relevance of the law of the place of the tort.[61] This movement has been effected not so much by reactionary vested righters but rather by a new wave eager to jettison the baggage of territoriality altogether and create choice of law rules which serve the interests of the parties, not of governments or of abstractions like sovereignty and comity.

Why the *lex loci*?

While there is clearly a good deal of support for the *lex loci* as the choice of law rule for tort, there is no complete agreement as to just why this rule should prevail. Connecting factors linking a dispute to a law area must be recognised as creatures of policy rather than of logic. It was stated above that there is some internal logic suggesting choice of law rules in other areas of law. But these rules are only logically compelling in so far as

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place other than that where the tort occurred" (para [6.62]) or where to apply the law of the place of the tort would violate the public policy of the forum (para [6.78]).

56 *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190. This decision left the double actionability rule of *Phillips v Eyre* intact as a starting point but allowed that the *lex fori* could be excluded in much the same way as the *lex loci* had been excluded in *Boys v Chaplin* [1971] AC 356. Either could be excluded as to one issue, as in *Boys*, or as to the entire case, following *Red Sea*.

57 (1995) 120 DLR (4th) 289.

58 J Lookofsky, "The State of the Union ... in Contract and Tort" (1993) 41 *Am J of Comp Law* 89. And see C G J Morse, "Choice of Law in Tort: A Comparative Study" (1984) 32 *Am J of Comp Law* 51.

59 See The Hague Convention on the Law Applicable to Traffic Accidents, art 3 and The Hague Convention on the Law Applicable to Product Liability, arts 4 and 5.

60 Th M De Boer, *Beyond Lex Loci Delicti* (1987) at 351-372.

61 See for example A Ehrenzweig, "A Counter-Revolution in Conflicts Law? From Beale to Cavers" (1966) 80 *Harvard L Rev* 377 and S Symeonides, "Revolution and Counter-Revolution in American Conflicts Law: Is There a Middle Ground?" in Symposium, above n 28 at 547.

they are corollaries of the policies of the substantive law. But the lack of a coherent policy foundation for the substantive tort law, and all the jurisprudential overlay which this topic carries has meant that the ground-swell of support for the *lex loci* rule is defended in a variety of ways.

Revesting vested rights

A courageous minority is willing to use the terminology of vested rights to sustain a *lex loci* rule. Given the scorn which the vested rights theory, current at the turn of the century, attracted from the American Realists and given that it is said to have been totally debunked decades ago,[62] it takes courage to raise that standard again. Dane[63] reinvented the terminology and defined "vestedness", which he posited as a choice of law principle, as requiring that "the court of any forum should, in selecting the criteria governing the substantive elements in an adjudication, apply choice of law criteria that could be expected to generate the same set of substantive criteria if they were applied by any other forum ..."[64] Deane J, citing Dane (who actually stated that his vestedness principle had "nothing whatsoever to say" about the territorialism of the original vested rights theory)[65] suggested that we might rethink the legitimacy of a territorially based rule for conflicts arising within Australia.[66] It is, of course, necessary for any territorialist to distance himself or herself from the now unfashionable jurisprudence of the earlier vested rights theorists. Theirs was a broodingly omnipresent common law which descended upon parties vesting them with powerful rights or crippling obligations which travelled about with them awaiting judicial declaration.[67] Notwithstanding a tarnished past, respectable arguments appear to give both the concept of the vested right and its familiar friend, territoriality, a new lease of life. At any rate, the impact of both concepts on choice of law is normally to suggest a *lex loci* rule.[68]

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62 B Currie, above n 15 at 6 said it had been "some years since Walter Wheeler Cook discredited the vested-rights theory as thoroughly as the intellect of one man can ever discredit the intellectual product of another".

63 P Dane, "Vested Rights, 'Vestedness' and Choice of Law" (1987) 96 *Yale Law Rev* 1191.

64 Ibid at 1205. This is what vestedness requires. What it *is* is less accessible. It grows out of a view of all law similar to that view of Australian constitutional law taken in *Breavington* by Wilson and Gaudron JJ and by Deane J. According to Dane, at 1245, a proper (norm-based) view of law cannot allow the analysis of substantive rights to depend on where they are litigated.

65 Ibid at 1209.

66 *Breavington v Godleman* (1988) 169 CLR 41 at 122 and 128.

67 Ironically, it is the majority of the High Court in *McKain v Miller* who appeared to hold this metaphysical view of the common law, at least in regard to the substance versus procedure dichotomy, where they held that rights may be statute-barred but not extinguished. One must wonder on what plane these rights continue to exist. And of course *Phillips v Eyre* itself was a product of vested rights thinking: "[C]ivil liability arising out of a wrong derives its birth from the law of the place, and its character is determined by that law." [1870] LR 6 QB 1 at 28 per Willes J.

68 The paradox of *McKain v Miller* and *Stevens v Head* is that they preserved *Phillips v Eyre* with its open reliance on vested rights while rejecting the role the *lex loci* logically plays in such a theory. *Phillips v Eyre* itself did not present such a paradox in so far as it is viewed as providing a jurisdiction rather than a choice of law test.

Justice to the parties

It has been mentioned above that justice to the parties is currently popular as a principled basis for choice of law rules. Here choice of law issues are being seen in the context of the adversarial nature of litigation. The parties themselves have raised the conflict of laws and are the only ones with any real vested interest in the outcome. This thinking is grounded in a view that choice of law rules are adjectival, or secondary, rules of law which do not address themselves to the people at large but to the courts ar ' 'hat the primary function of the rules is to enable the courts to perform their proper role of fairly adjudicating individual disputes. It is in this view of the court's role that "justice to the parties" thinking differs from interest analysis which views the court's primary function as applying the law of the forum.

Of course "justice to the parties" is going to mean different things to different people. At one extreme it can mean an ad hoc decision based on the merits of each individual conflict.[69] At the other it can mean formulating rules which do the most justice to the most parties most of the time. And within either of these approaches there is latitude of choice as to what "justice" means. For example, to Lea Brilmayer justice is protection of a party's overtly political right to be left alone by legal systems and their laws which are unconnected to that party. She suggests a test of minimal contacts along the lines of the test for personal jurisdiction in the United States.[70] In other words, a party would be beyond the reach of a jurisdiction's laws unless that party or his or her activities were at least minimally connected to that jurisdiction. This approach, emphasising as it does a negative right, does not supply a positive choice of law answer in all cases but rather sets a bottom line in terms of justice.[71]

The more mainstream view of what justice to the parties means is that individual parties should have the law applied to their dispute which they would have expected to apply. In addition to the practical problem, mentioned above, that the parties' expectations will often point in different directions, there are more conceptual problems here of two sorts.

First, so-called party expectations end up being those that the court believes a party would have had.[72] Highly questionable assumptions about human behaviour are likely to be invoked. For example, Peter Kincaid has relied on the parties' expectations theory to argue that the decision of the House of Lords in *Boys v Chaplin*[73] was wrong.[74] In that case both parties were English servicemen stationed in Malta where they were

69 In the United States at least, the "better law" theorists such as Leflar and Juenger have a toe-hold on mainstream thinking. Juenger claims better law theory is the heir to the *jus gentium*. See F Juenger, above n 30.

70 L Brilmayer, above n 8. This is not helpful in any specific sense in Australia with its lower personal jurisdiction threshold. And it clearly flies in the face of whatever "one nation" feelings survive in the High Court.

71 Brilmayer offers this as a threshold test, ibid at 208.

72 In *Tolofson v Jensen* (1995) 120 DLR (4th) 289 at 302, La Forest J referred to the expectations of the parties as "a somewhat fictional concept" and went on to say that "[t]he truth is that a system of law built on what a particular court considers to be the expectations of the parties or what it thinks is fair, without engaging in further probing about what it means by this, does not bear the hallmarks of a rational system of law".

73 [1971] AC 356.

74 P Kincaid, "Justice in Tort Choice of Law" (1996) 18 *Adel L Rev* 191. Kincaid is actually arguing for a party expectation *exception* to a *lex loci delicti* rule.

involved in an accident between the defendant's car and the motorcycle on which the plaintiff was a passenger. The defendant admitted negligence, and the only issue was whether Maltese law or English law governed the damages available. Kincaid suggests that both the parties would have expected Maltese law to apply to these facts and the lower (Maltese) amount of damages to be the limit of the defendant's liability *and* that the defendant might therefore have failed to insure himself against exposure to a higher risk. Taking this to its logical, though perhaps absurd, extreme, one could argue the defendant might have made decisions about how much care to take in his driving on the basis of the lower liability. Where does this assumption of a mutual expectation of Maltese law come from exactly? Apparently from some intuitive idea of human nature. But my intuition is to the opposite effect.[75] And the subsidiary assumptions as to likely acts of reliance on the applicability of Maltese law are themselves premised on a notional "reasonable" person blessed with an uncanny prescience.

The second conceptual problem with the reliance on party expectations as the connecting factor in tort choice of law is that built into the better articulations of this test (of justice to the parties): the requirement that the party expectations be *legitimate*. This of course raises a normative question, which in turn raises something of a paradox. On the one hand, in some very specific types of cases, the normative question is a very hard one indeed. On the other hand, in the majority of cases the question is of no real moral significance at all. The cases which raise the hard question tend to be cases of mass torts, either arising out of product liability, employer liability or environmental damage on a large scale. For example, is it legitimate for a multinational corporation based in a jurisdiction with stringent product liability laws to market unsafe products in developing countries without such laws in the expectation that local law will govern compensation claims arising out of any injuries?[76] Is it legitimate for a corporation based in a jurisdiction with stringent worker safety laws to relocate some of its operations to a developing country not only in order to avail itself of cheaper labour, but also in the expectation that liability standards and awards will be lower in the event of injury to its workers or nearby residents?[77] It is very likely in such a case that even the plaintiff's expectations would be of local law applying. And here it is not artificial to imagine that this defendant has insured and acted in accordance with its potential liability under local law. But whether the defendant's expectations are legitimate is a question of considerable moral significance.

I suspect many would say that these economic decisions were legitimate. To suggest otherwise, that is, to argue that these defendants and potential defendants ought to be held to the stricter standards imposed by the tort law of their own countries, certainly has implications for much-desired investment in developing economies. And it smacks of legal imperialism.

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75 To the extent that I can imagine the parties having had *any* expectations at all regarding applicable law as to damages available in the event of their being involved in an accident.

76 Other similar instances which have captured worldwide attention involve products which are not inherently unsafe if used in accordance with accompanying written warnings but which will not be safe in the places where they are marketed where literacy levels are low or other factors make the product unsuitable or unsafe. Examples are infant formula powdered milk in areas without clean water, and anti-diarrhoeal drugs (which may be inherently unsafe for small children) in areas where many infants and children are at risk of death from diarrhoea.

77 As Union Carbide presumably did prior to the Bhopal disaster.

The point here, though, is one regarding the persuasiveness of the argument that choice of law rules in tort ought to give effect to the parties' expectations as to applicable law. These expectations, in order to count as a principled basis for a choice of law rule, must be legitimate which means they must satisfy *someone's* normative standards. Unfortunately, the formulation of such standards by *anyone* simply takes us back to square one. Square one in this argument was that, because of deeply conflicting views as to the proper function of the substantive tort law, there is little hope for a consensus as to a proper choice of law rule for tort. Ultimately, it may seem inappropriate for courts deciding individual cases to use choice of law as a tool for enforcing any norms in this type of case. Public regulatory mechanisms would surely be the right tool for the job. And yet the question does arise for the courts and they have no option but to address it.[78] In these comparatively rare but important cases, the jury is still out on whether the legitimate expectation is of the more plaintiff-friendly, protective law or the *lex loci*.

The paradox is created by the converse concern with the imposition of norms on the party expectation test. While it is true that in some few (but big) cases the question of the appropriate norm may be too hard a question for a choice of law rule to address, the opposing concern is that in the great run of cases, the normative question carries so little interest that it is not worth pursuing. The comments made by Mason CJ in *Breavington* regarding the "reasonable and legitimate" expectations as to applicable law of Australians driving around Australia provide an example.[79] I just cannot see that reason and legitimacy come into this very much. Admittedly, it would be unreasonable and perhaps even illegitimate for a Queenslander, who injures a Victorian while holidaying in Tasmania, to expect Western Australian law to govern his tortious liability. No such claim would be made except to support an outrageous attempt at forum-shopping — outrageous because the posited Western Australian law would have no connection whatsoever with the events or the parties.[80] But most forum-shopping is not so patently outrageous (although we could get there with our forum-shopper's utopia) and, even if it were, what is wrong with this scenario is not that the expectation of Western Australian law applying is unreasonable or illegitimate, but rather that such expectations do not exist. In reality, both posited laws will have some meaningful connection to the matter before the court, and it will be hard to muster

78 In the Bhopal case, one ground on which the *forum non conveniens* application was granted by the United States court was that Indian law would apply to the dispute: *In Re Union Carbide Gas Plant Disaster* 809 F2d 195 (1987). The choice of law question has been raised directly in the agent orange litigation, above n 29, and found to be too hard. The very nature of these actions makes any attempt to give effect to each party's expectations so inefficient as to militate toward unfairness to all parties in the form of excessive time and money spent on the exercise. Thus Judge Weinstein in the agent orange cases decided to apply "national consensus common law to all substantive issues": *In Re Agent Orange Product Liability Litigation* 580 F Supp 690 at 711 (1984). Whether this solution would have withstood further appellate scrutiny is unknown as the parties to the class action ultimately settled.

79 *Breavington v Godleman* (1988) 169 CLR 41 at 77.

80 Mason CJ provided for this by also recognising that a substantial connection between the applicable law and the matter in dispute is necessary, ibid at 79. In the United States the Due Process clause of the Fourteenth Amendment has been held to require that the applicable law be that of a state with a significant interest in the application of its law to the case: *Allstate Insurance Co v Hague* 449 US 302 (1981).

much of a sense that anyone's expectations as to governing law are unreasonable, much less illegitimate. It simply is not often a value-loaded question: what law ought the parties expect to apply?

Ultimately, the considerations of which party expectations *ought* to be given effect, assuming they are knowable, is likely to be either too morally hard or simply irrelevant to supply meaning to "justice to the parties". At any rate, if a reasonably certain and predictable choice of law rule existed for tort, such a rule would be expected by those parties who are in fact planning their activities on the basis of applicable tort law and this would contribute an element of justice, but it would be justice derived from certainty and predictability, with fulfilment of expectations being a by-product, not a driving principle.[81] Of course the central problem remains that certainty as to applicable law is only one element of justice.

Many other, perhaps unforeseeable, factors may affect the just result of an individual case. As the House of Lords judgments in *Boys v Chaplin* and *Red Sea Insurance* make clear, the competing concerns of certainty and flexibility create a constant tension. This tension is exacerbated by the potential for wide disagreement as to when flexibility is called for and what form it should take.

THE NEED FOR FLEXIBILITY — WHY THE SONG SHOULD NOT END

It has been suggested above that it would be better for choice of law in tort to continue to be dealt with by the courts than by the parliaments. Given the Australian High Court's recent jurisprudence in this area, this statement requires some defending. This is especially true given that the Australian Law Reform Commission has put together an impressive set of recommendations for Commonwealth legislation on the matter.[82] The United Kingdom legislation also provides a tempting model. The reason that common law processes are nevertheless to be preferred is the need for an honest and open-ended flexibility in choosing the applicable law for a tort case.

The legislation recommended by the Australian Law Reform Commission provides flexibility by allowing for displacement of the *lex loci* rule when the tort has a substantially greater connection with another jurisdiction.[83] But the need for flexibility in the mass tort case would not be accommodated here, at least not in any straightforward sense. The Commission's proposal also provides for defining the place of the tort differently for different torts. This does provide some scope for further flexibility but forces that flexibility into one analytical approach. For example, in the type of mass tort case referred to above, if one thought it desirable to apply the more plaintiff-protective law, the argument would need to be made that the tort occurred "at home" where the marketing or other decisions were made. This is unduly artificial. Such contortions should not have to be resorted to in order to achieve a just result.

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81 Certainty and predictability are, of course, about more than giving effect to expectations. They allow people (not yet parties) to plan their activities so that perhaps disputes are avoided in the first place, and, once a dispute does arise, certainty as to applicable law would mean that choice of law need not be litigated and the likelihood of the substantive dispute's being settled would in most cases be greatly increased.

82 ALRC 58, above n 2.

83 And, if in interstate situations, the objects and purposes of laws of both places will be promoted: ibid, Draft Bill cl 8.

The Commission's proposals, however, do not fall into the common trap of compiling a list of relevant factors to consider. The usual problem with a list, particularly a statutory list of considerations which might justify divergence from the general rule, is that this list is bound to limit (even if it is intended to be non-exhaustive) the imagination of counsel and the discretion of judges. The rapid evolution of tort makes such lists obsolete almost before they can be published. For example, while the judges are worrying over whether they should diverge from a given rule in cases like *Boys v Chaplin,* where the parties are only tenuously connected to the place of the tort, potential mass tortfeasors are banking on connecting themselves and their activities to places of low tortious liability. The required flexibility must be as open-ended as possible to accommodate the unforeseeable case as well as the familiar fact patterns.

The United Kingdom legislation has included a list of relevant factors for courts to consider when deciding whether to displace the *lex loci* rule. This list suffers from the opposite problem: it is so general as to be almost meaningless. The factors include those "relating to the parties, to any of the events which constitute the tort or delict in question or to any of the circumstances or consequences of those events."[84] The fact that the drafters felt the need to make even this seemingly all-encompassing list non-exhaustive brings home the point about the usefulness of such lists very nicely.

A better solution would be a common law rule that simply states that, while the presumed applicable law is that of the place of the tort, courts hold a discretion to apply another law if justice to the parties so demands. Limitation legislation and other procedural rules operate effectively and justly within such a framework.[85] A rigid rule therefore would apply but judges would be able to exercise discretion to avoid any patent injustice the rule would work in an individual case. Precedents accumulate on the issue of what constitutes an appropriate exercise of discretion. If choice of law rules ought to give justice to the parties, as many are saying, then it is a procedural, general justice to all parties and potential parties which they should provide. This means a high level of rigidity ameliorated by a discretion which ought be sparingly exercised.

To have it otherwise, with a weak presumption as to the general rule and heavy reliance on discretion to opt out of that rule, is procedurally unjust in that it undermines certainty and is wasteful of courts' time and parties' money. My preference would be for a strong presumption that the law of the place of the tort applies — for all the usual reasons advanced, the thrust of these reasons being that this rule satisfies most choice of law concerns[86] as well as most tort concerns[87] most of the time. When

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84 Choice of Law (Miscellaneous Provisions) Act 1995 (UK), s 12(1).

85 Of course statutes of limitation are just that — statutes (and I am proposing a common law rule). But while settling on an arbitrary rule which will be fairly rigidly applied may be more appropriately done by a legislature, settling on a principled rule which will be applied fairly rigidly is done by courts all the time.

86 Specifically certainty, predictability, prevention of forum-shopping opportunities and the political right not to be subjected to a legal regime unrelated to one's activities.

87 Any tort law regime will effectuate *some* jurisdiction's tort concerns. The fact that these differ more radically than do different regimes' contract or property concerns is not going to go away, which is a very good argument for putting our energies into fashioning a choice of law rule around choice of law concerns and dropping the pretence of using it to give effect to tort law concerns.

such a rule would work a clear injustice to the parties before the court, no escape devices should be necessary. Discretion to apply the more appropriate law would exist.

And so the song would not end, but it might develop a less cacophonous melody. Most tort choice of law cases would be straightforward. Those that should not be would contribute to a jurisprudence of choice of law as partner to, rather than servant of, an evolving tort law.